UNITED STATES PATENT AND TRADEMARK OFFICE

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EXAMINER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

PTOL-90A (Rev. 04/07)

	Application No.	Applicant(s)
Office Action Summary	09/884,674	CHU ET AL.
	Examiner	Art Unit	
	Philip C. Lee	2152	

-- *The MAILING DATE of this communication appears on the cover sheet with the correspondence address* --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on <u>28 June 2007</u>.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-11 and 19-30* is/are pending in the application.

   4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-11 and 19-30* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

   Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

   Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

   a)☐ All   b)☐ Some * c)☐ None of:

   1.☐ Certified copies of the priority documents have been received.

   2.☐ Certified copies of the priority documents have been received in Application No. _____.

   3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

   * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1)☐ Notice of References Cited (PTO-892)

2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3)☐ Information Disclosure Statement(s) (PTO/SB/08)
   Paper No(s)/Mail Date _____.

4)☐ Interview Summary (PTO-413)
   Paper No(s)/Mail Date _____.

5)☐ Notice of Informal Patent Application

6)☐ Other: _____.

1.   This action is responsive to the amendment and remarks filed on June 28, 2007.

2.   Claims 1, 3-11 and 19-30 are presented for examination.

3.   The text of those sections of Title 35, U.S. code not included in this office action can be

found in a prior office action.

Claim Rejections - 35 USC 112

3.   Claims 8-11 and 19-20 are rejected under 35 U.S.C. 112, second paragraph, as being

indefinite for failing to particularly point out and distinctly claim the subject matter which

applicant regards as the invention.

   a.   Claim language in the following claims is not clearly understood:

      i.   As per claim 8, line 1, the term "tangible" renders the scope of the claim

   undeterminable.

Claim Rejections - 35 USC 103

4.   Claims 1, 3-11, 19-20 and 25-29 are rejected under 35 U.S.C. 103(a) as being

unpatentable over Emens et al, U.S. Patent 6,606,643 (hereinafter Emens) in view of

Ramanathan et al, U.S. Patent 5,913,041 (hereinafter Ramanathan).

5.   Emens and Ramanathan were cited in the last office action.

6.   As per claim 1, Emens taught the invention substantially as claimed for managing a

plurality of sources comprising:

      selecting an empirical measurement of a performance of each of the plurality of sources

      (col. 3, lines 47-58);

      selecting a source in reference to the empirical measurement of the performance of each

      of the plurality of sources (col. 3, line 66-col. 4, line 3); and

      initiating a download of data from a download source of the plurality of sources (abstract;

      col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

7.   Emens did not teach selecting according to a size of data to be obtained. Ramanathan

taught the method comprising selecting an empirical measurement of a performance of each of

the plurality of sources, wherein the empirical measurement is selected according to a size of

data to be obtained (col. 9, lines 15-23, and 38-59; col. 7, lines 45-50) (i.e., throughput

measurement is set (selected) only for transfer exceeding 70 KBtyes).

8.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of selecting an empirical measurement according to a size of data to be obtained would

increase the accuracy of Emens's system by allowing performance evaluation based on the size

of the transfer data(col. 3, lines 15-27).

9.   As per claims 8 and 10, Emens taught the invention substantially as claimed for

managing a plurality of sources, wherein executable instructions capable of directing a processor

to perform:

      selecting an empirical measurement of a throughput speed of each of the plurality of

      sources (col. 3, lines 47-58);

      selecting a source in reference to the empirical measurement of the throughput speed of

      each of the plurality of sources (col. 3, line 66-col. 4, line 3) (Note that the throughput

      speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to

      the specification, page 17, lines 1-7, if the size of the transmission and response is equal

      for each source tested.) ; and

      initiating a download of data from a download source of the plurality of sources (abstract;

      col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

10.   Emens did not teach selecting according to a size of data to be obtained. Ramanathan

taught the method comprising selecting an empirical measurement of a throughput of each of the

plurality of sources, wherein the empirical measurement is selected according to a size of data to

be obtained (col. 9, lines 15-23, and 38-59; col. 7, lines 45-50) (i.e., throughput measurement is

set (selected) only for transfer exceeding 70 KBtyes).

11.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of selecting an empirical measurement according to a size of data to be obtained would

increase the accuracy of Emens's system by allowing performance evaluation based on the size

of the transfer data(col. 3, lines 15-27).

12.   As per claim 25, Emens taught the invention substantially as claimed for managing

sources in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col.

4, lines 19-22) comprising:

    a processor (inherently comprised); and

    software means operative on the processor for selecting an empirical measurement of a

    throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66-

    col. 4, line 3);

    the software means selecting a source in reference to the empirical measurements of the

    throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66-

    col. 4, line 3); and

    a transmitter to initiate a download of data to a download source of the plurality of

    sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

13.   Emens did not teach selecting according to a size of data to be obtained. Ramanathan

taught the method comprising selecting an empirical measurement of a throughput of each of the

plurality of sources, wherein the empirical measurement is selected according to a size of data to

be obtained (col. 9, lines 15-23, and 38-59; col. 7, lines 45-50) (i.e., throughput measurement is

set (selected) only for transfer exceeding 70 KBtyes); and software means including obtainer

means to obtain an empirical measurement of a throughput speed of each of the plurality of

sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines

48-51; col. 6, lines 38-49).

14.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of selecting an empirical measurement according to a size of data to be obtained would

increase the accuracy of Emens's system by allowing performance evaluation based on the size

of the transfer data(col. 3, lines 15-27).

15.   As per claim 28, Emens taught the invention substantially as claimed comprising:

a determiner (e.g. the calibration applets) of an empirical measurement of a throughput

speed of each of the plurality of download peer-to-peer network sources (i.e. data can be

exchange freely between two computer) (col. 4, lines 19-22; col. 7, lines 44-54);

a selector (e.g. the calibration manager) of a source in reference to the empirical

measurement of the throughput speed of each of the plurality of peer-to-peer network

sources (col. 7, lines 44-54); and

a transmitter to initiate a download of data to a download source of the plurality of peer-

to-peer network sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-

64).

16.   Emens did not teach selecting according to a size of data to be obtained. Ramanathan

taught the method comprising selecting an empirical measurement of a throughput of each of the

plurality of sources, wherein the empirical measurement is selected according to a size of data to

be obtained (col. 9, lines 15-23, and 38-59; col. 7, lines 45-50) (i.e., throughput measurement is

set (selected) only for transfer exceeding 70 KBtyes); and determining an empirical measurement

of a throughput speed of each of the plurality of sources from at least one third-party source (e.g.

content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

17.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of selecting an empirical measurement according to a size of data to be obtained would

increase the accuracy of Emens's system by allowing performance evaluation based on the size

of the transfer data(col. 3, lines 15-27).

18.   As per claim 3, Emens and Ramanathan taught the invention substantially as claimed in

claim 1 above. Ramanathan further taught obtaining an empirical measurement of a throughput

speed of each of the plurality of sources from a local source (col. 3, lines 43-58; col. 6, lines 38-

49). (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as

defined according to the specification, page 17, lines 1-7, if the size of the transmission and

response is equal for each source tested.)

19.   As per claim 4, Emens and Ramanathan taught the invention substantially as claimed in

claim 1 above. Ramanathan further taught that the performance includes throughput speed (col.

3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

20.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

method of obtaining the throughput speed would increase the accuracy of Emens's system by

providing a measure rate at which data is transferred between server system and a remote

personal computer of a subscriber (col. 1, lines 60-65).

21.   As per claims 5 and 27, Emens and Ramanathan taught the invention substantially as

claimed in claims 1 and 25 above. Emens further taught wherein the performance comprises

latency (col. 3, lines 55-56).

22.   As per claim 6, Emens and Ramanathan taught the invention substantially as claimed in

claim 5 above. Emens further taught wherein the determining the empirical measurement further

comprises:

measuring the elapsed time of a transmission involving each of the plurality of sources (col. 3,

lines 56-58).

23.   As per claims 7, 11 and 20, Emens and Ramanathan taught the invention substantially as claimed in claims 5, 8 and 10 above. Emens and Ramanathan further taught wherein the determining the empirical measurement further comprises for each of the plurality of sources:

recording transmission time from the current time and date (see Ramanathan, col. 5, lines 52-62);

initiating a transmission to a download source of the plurality of sources (see Emens, col. 3, lines 49-51);

receiving a response to the transmission from the source (see Emens, col. 3, lines 51-53);

recording the receipt time from the current date and time (see Ramanathan, col. 5, lines 52-62); and

determining the throughput speed of the source from the difference between the receipt time and the transmission time (see Emens, col. 3, lines 56-58; col. 5, lines 42-49).

24.   As per claim 9, Emens did not teach comprising a download speed. Ramanathan taught wherein the throughput speed further comprises a download speed (col. 2, lines 9-13).

25.   It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's method of obtaining the throughput speed would increase the accuracy of Emens's system by providing a measure rate at which data is transferred between server system and a remote personal computer of a subscriber (col. 1, lines 60-65).

26.   As per claim 19, Emens and Ramanathan taught the invention substantially as claimed in

claim 8 above. Emens further taught wherein source further comprises a source in a peer-to-peer

network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22).

27.   As per claim 26 Emens and Ramanathan taught the invention substantially as claimed in

claim 25 above. Emens further taught wherein the throughput speed further comprises a round-

trip time (col. 5, lines 48-49).

28.   As per claim 29, Emens and Ramanathan taught the invention substantially as claimed in

claim 28 above. Emens further taught comprising:

      a transmitter (e.g. the calibration applets) to transmit a message to a download source of

      the plurality of sources (col. 3, lines 49-51);

      a recorder (e.g. timer) of the time of a transmission of a message, operably coupled to the

      transmitter (col. 5, lines 42-45);

      a receiver of a response to the transmission from the source, operably coupled to the

      transmitter (col. 3, lines 51-53);

      a recorder (e.g. timer) of the time of receipt of a response (col. 5, lines 42-45); and

a determiner (e.g. the calibration manager) of the throughput speed of the source, from the

difference between the receipt time and the transmission time (col. 3, lines 56-58; col. 5, lines

42-49).

29.   Claims 21-24 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over

Emens and Ramanathan in view of Andrews et al, U.S. Patent Application Publication

2002/0038360 (hereinafter Andrews).

30.   Andrews was cited in the last office action.

31.   As per claim 21, Emens taught the invention substantially as claimed for managing a

plurality of sources comprising:

    obtaining a list comprising a plurality of identification of sources (col. 3, lines 38-46);

    initiating a plurality of connections, the plurality of connections further comprising one

    connection for each of the plurality of sources, yielding a plurality of initiated

    connections (col. 3, lines 48-51);

    receiving a response for the each of the plurality of initiated connections, yielding a

    plurality of responses (col. 3, lines 51-53);

    selecting a source of the plurality of sources in reference to the empirical measurement of

    performance (col. 3, line 66-col. 4, line 3); and

    initiating a download of data from a download source of the plurality of sources (abstract;

    col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

32.   Emens did not teach selecting according to a predetermined file size. Ramanathan taught

the method comprising selecting an empirical measurement of a performance of each of the

plurality of sources, the empirical measurement is selected according to a predetermined file size

(col. 9, lines 15-23, and 38-59; col. 7, lines 45-50) (i.e., throughput measurement is set (selected) only for transfer exceeding 70 KBtyes).

33.   It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selecting an empirical measurement according to a predetermined file size would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

34.   Emens and Ramanathan did not teach socket connections. Andrews taught socket connections (i.e. three way handshake) could be measured for client accessing a content server (page 4, paragraphs 46 and 47). Note that it is inherent that a three-way handshake is to establish socket connection between a client and a server. The three-way handshake includes initiating a socket connection by using a synchronization (SYN message) and receiving a response (ACK message) for the initiated socket connection.

35.   It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of Emens's and Ramanathan's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

36.   As per claim 22, Emens, Ramanathan and Andrews taught the invention substantially as

claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

          selecting the source associated with the response that is received first (col. 3, lines 47-58;

col. 3, line 66-col. 4, line 6).

37.   As per claim 23, Emens, Ramanathan and Andrews taught the invention substantially as

claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

          measuring the latency of each of the plurality of sources (col. 3, lines 47-58); and

          selecting a source in reference to the download speed of each of the plurality of sources

          (col. 3, line 66-col. 4, line 6).

38.   As per claim 24, Emens taught the invention substantially as claimed wherein measuring

the latency further comprises:

          storing a time of each of the plurality of initiating connection (col. 5, lines 42-45);

          storing the time of each of the plurality of responses (col. 5, lines 42-45); and

          determining the download speed of each of the plurality of sources from the differences

in time between the time of each of the plurality of the responses and the time of each of the

plurality of the initiating connections (col. 3, lines 56-58; col. 5, lines 42-49). Note that the

download speed could be the throughput speed (i.e. or could be the throughput time if the size of

the transmission and response is equal for each source tested according to the specification on

page 17, lines 1-7) according to the specification, page 13, lines 1-4.

39.   Emens did not teach including a date with the transmission time or the receipt time.

Ramanathan taught the method of recording the time and date (col. 5, lines 52-62).

40.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of recording the transmission date and receipt date would increase the alertness of

Emens's system by allowing a user to monitor the transaction with the external network.

41.   Emens and Ramanathan did not teach socket connections. Andrews taught socket

connections (i.e. three way handshake) could be measured for client accessing a content server

(page 4, paragraphs 46 and 47).

42.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens, Ramanathan and Andrews because

Andrews's method of measuring the socket connections would increase the efficiency of

Emens's and Ramanathan's systems by locating content servers in response to the minimal round

trip time (page 1, paragraph 8).

43.   As per claim 30, Emens and Ramanathan taught the invention substantially as claimed in

claim 28 above. Emens and Ramanathan did not specifically detailing the establishment of the

socket connection comprising a TCP/IP synchronized idle message and a TCP/IP

acknowledgment message. Andrews taught wherein the transmission further comprises a

TCP/IP synchronized idle message (page 4, paragraph 47); and the response further comprises a

TCP/IP acknowledgment message (page 4, paragraph 47).

44.   It would have been obvious to one having ordinary skill in the art at the time of the

invention was made to combine the teachings of Emens, Ramanathan and Andrews because

Andrews's method of comprising a TCP/IP synchronized idle message and a TCP/IP

acknowledgment message would increase the capability of Emens's and Ramanathan's systems

by allowing establishment of a socket connection for accessing content on the server.

45.   Applicant's arguments with respect to claims 1, 3-11 and 19-30, filed 06/28/07, have

been fully considered but are not deemed to be persuasive.

46.   In the remark applicant argued that:

> (1)   The term "tangible" has a reasonable degree of clarity and
> particularity such that the claim is definite.
>
> (2)   Ramanathan fails to teach selecting or choosing a particular type of
> performance measurement from a variety of different empirical
> measurements.

47.   In response to point (1), as stated in the remarks filed 6/28/07, on page 8, last paragraph,

"the term "tangible" is defined as "possible to touch"". This means it is indefinite if it is capable

of being touched. Accordingly, the rejection maintained.

48.   In response to point (2), applicant's argument that the references fail to show certain

features of applicant's invention, it is noted that the features upon which applicant relies (i.e.,

selecting *a particular type of performance measurement* from a variety of differing empirical

measurements) are not recited in the rejected claim(s). Although the claims are interpreted in

light of the specification, limitations from the specification are not read into the claims. See *In*

re Van Geuns, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

49.   **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time

policy as set forth in 37 CFR 1.136(a). A shortened statutory period for reply to this final action

is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply

is filed within TWO MONTHS of the mailing date of this final action and the advisory action is

not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the

advisory action. In no event, however, will the statutory period for reply expire later than SIX

MONTHS from the mailing date of this final action. Any inquiry concerning this

communication or earlier communications from the examiner should be directed to Philip C Lee

whose telephone number is (571)272-3967. The examiner can normally be reached on 8 AM TO

5:30 PM Monday to Thursday and every other Friday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bunjob Jaroenchonwanit can be reached on (571) 272-3913. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

P.L.

BUNJOB JAROENCHONWANIT
SUPERVISORY PATENT EXAMINER

9/12/7